VASAN SINGH

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR ACTING LP
HASHIM YEOP SANI SCJ
HARUN HASHIM SCJ
[CRIMINAL APPLICATION NO. 1 OF 1988]
14 OCTOBER 1988

CRIMINAL LAW AND PROCEDURE: *Alibi - Defence of alibi - Accused gives evidence on his own behalf - Accused propose to call no other witness in support thereof - Section 402A CPC - Whether notice required to be given - Distinction between bare denial and alibi defence.*

This was a reference under s. 66 of the Courts of Judicature Act 1964 on the following question.

> Is an accused person who gives evidence on his own behalf of a defence of alibi but who proposes to call no other witnesses in support thereof, obliged to give notice under s. 402A of the Criminal Procedure Code.

Held:

[1] The words of s. 402A(1) of the Criminal Procedure Code given their natural meaning include the case where the accused above is to testify that he was elsewhere at the material time.

[2] The trial Magistrate correctly recorded the evidence of the applicant but was wrong to exclude it from the defence evidence because what the applicant said (that he was not involved in the fight and was in bed) is a bare denial of the charge.

[3] On the facts of this case both the trial Magistrate and the Appellate Judge were in error in excluding the appellant's evidence that he was not involved in the fight and that he was in bed at the material time because this was not evidence of an alibi but a mere denial.

[4] There was ample evidence to support the conviction and there are therefore no grounds to make any other order.

[5] For the reasons as stated, the question was answered in the Affirmative that the evidence is in support of his alibi and not a bare denial.

[Question answered in Affirmative.]

Cases referred to:
PP v. Lim Chen Len [1981] 2 MLJ 41
Ku Lip See v. PP [1982] 1 MLJ 195
Hussin bin Sillit v. PP [1988] 1 CLJ (Rep) 128
Rangapula v. PP [1981] CLJ (Rep) 261

Legislation referred to:
Courts of Judicature Act 1964, s. 66
Criminal Procedure Code, ss. 402A, (1), 422

For the applicant - Jagjit Singh; M/s. Lawrence, Dhillion & Associates
For the respondent - Stanley Isaacs; Attorney-General

JUDGMENT

Harun Hashim SCJ:

This is a reference under s. 66 of the Courts of Judicature Act 1964 on the following question:

> Is an accused person, who gives evidence on his own behalf of a defence of alibi who proposes to call no other witnesses in support thereof, obliged to give notice under s. 402A of the Criminal Procedure Code.

The applicant was charged in the Magistrate's Court at Bentong with voluntarily causing hurt to one Markhan Singh a/1 Dnan Singh (complainant) on 16 January 1983 at about 10.45 p.m. in the compound of House No. KT 270 Kg. Ketari, Bentong under s. 323 of the Penal Code. The applicant lives at No. 271. At about 2 p.m. that day, the complainant erected a 9 ft. high zinc fence thus blocking the window of applicant's kitchen. An attempt was made later that day to pull the fence down. the police were called in at about 7.30 p.m. who advised them not to quarrel. At about 10.30 p.m. the complainant heard banging and breaking noises coming from the zinc fence. A free-for-all ensued in the compound of No. 270 between the occupants of Nos. 270 and 271. In all there were about ten persons involved in the fight. Several of them were injured. By the time the police arrived a second time at about 11.10 p.m. the fight was over but they found several blood-stained weapons and blood in the compound of No. 270.

The occupants of both houses are related, the principal occupants being brothers and their families. According to the complainant it was the applicant (a brother) who struck him with a weapon which looked like a sickle. He warded off the blow but cut his left thumb. According to the applicant however, he went to bed at about 10 p.m.. At about 11 p.m. he heard noises and came out and saw Gian Singh and Dalbir Singh who were in his house covered with blood. He asked them what had happened and Gian Singh said they had been attacked by his uncle (the complainant) and son. The police arrived and took them to hospital.

At the trial, the prosecution objected to the defence of alibi put up by the applicant on the ground that no notice had been served on the prosecution under s. 402A of the CPC. The trial Magistrate agreed and in his grounds of decision said he excluded this defence. In the event he found the applicant guilty, convicted him of the offence and sentenced him to one day's imprisonment and fine of RM300 in default 4 months imprisonment.

The applicant appealed against conviction and sentence on the ground that his defence of alibi was wrongly excluded. It was submitted that no notice under s. 402A was necessary where there was no intention to call witnesses other than the accused person himself. The appellate Judge did not agree and dismissed the appeal.

Section 402A CPC reads:

> (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the Public Prosecutor at least ten days before the commencement of the trial.
>
> (2) The notice required by sub-section (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

In *PP v. Lim Chen Len* [1981] 2 MLJ 41 the accused was charged with extortion under s. 384 of the Penal Code alleged to have been committed in Kuala Lumpur. The defence was one of alibi. The accused gave evidence on oath that at the material time he was in Slim village, Perak.

Four witnesses gave evidence in support of the alibi. The prosecution objected to the admission of such evidence as no notice had been given under s. 402A CPC. The trial notice is an irregularity and not an illegality which is curable by s. 422 of the CPC. On appeal, it was held that the provisions of s. 402A(1) are evidential and not merely procedural and as no pre-trial written notice had been given, no evidence in support of a defence of alibi can be admitted in evidence. At p. 42 of the judgment, Azmi J (as he then was) said:

> As to the extent of the applicability of s. 402A(1), I am of the view that the words "evidence in support thereof" includes evidence of alibi given by the accused himself if he elects to give evidence on oath. Although the words "evidence in support of an alibi" have not been statutorily defined in the Criminal Procedure Code, it can be taken to mean evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. The provision of s. 402A(2) which, *inter alia*, requires the pre-trial notice under sub-section (1) to include particulars of the place where the accused claims to have been at the time of the commission of the offence, supports my view that the provision of s. 402A(2) also applies to an accused person where he elects to be a witness and gives sworn evidence.

PP v. Lim Chen Len was approved by the Federal Court in *Ku Lip See v. PP* [1982] 1 MLJ 195 as follows at p. 196:

> We have noted what Azmi J said in *PP v. Lim Chen Len* concerning the admissibility of evidence in support of defence of alibi and we are of the view that he decided correctly.

In *Hussin bin Sillit v. PP* [1988] 1 CLJ (Rep) 128 the Supreme Court said at p. 130:

> ... it is clear law that where the defence is an alibi then, any evidence in support of that defence must be excluded unless notice is complied with. As was held in *Lim Chen Len* and approved by *Ku Lip See* and also ruled by the learned Judge himself in *Rangapula* [1981] CLJ (Rep) 261, the Court has no discretion to waive pre-trial notice where the evidence to be adduced by the defence is evidence in support of a defence of alibi.

Section 402A was added to the Criminal Procedure Code in 1976. Until then, accused persons were free to put up an alibi defence and to call witnesses in support of the alibi thus creating an element of surprise at the trial. The object of s. 402A is aimed at this mischief. It seeks to deprive accused persons of the privilege of keeping back a defence of alibi until the last moment. Clearly the object is to prevent the accused person from keeping back not merely the names of any witnesses he might call in support of the alibi, but also the fact that an alibi is to be raised.

The question is, has the legislature achieved these objectives in s. 402A. There is certainly now abundant authority that if witnesses are to be called in support of an alibi defence, then the requirements of a pre-trial notice must be complied with - strictly. What then is the position where the accused himself is the only witness to the alibi. It is obvious, however, that an alibi defence will not be a simple statement of: "I did not do it. I was not there. I was elsewhere." That would be evidence of a bare denial. To establish his alibi, the accused must disclose where he was at the time of the alleged offence and what he was doing. He could be travelling at the time and the only evidence he has is a ticket or an endorsement on his passport or, as here, he was in bed. That would be **evidence in support** of his alibi.

The question is whether the words **seeks to put forward** in s. 402A(1) include the case where the accused himself gives evidence. An accused who gives evidence himself clearly does so because he is seeking to put forward evidence tending to show that he was elsewhere at a particular time. And that evidence is the **evidence in support** referred to in the sub-section. We are therefore of the view that the words of s. 402A(1) given their natural meaning include the case where the accused alone is to testify that he was elsewhere at the material time. Thus:

Sub-section (1) standing by itself clearly means that notice must be given in all cases of an alibi defence otherwise the evidence will be excluded. No distinction is made between an alibi defence of the accused alone and an alibi defence supported by witnesses.

Sub-section (2) sets out the particulars required in such a notice which is in two parts:

(a) Particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged; and

(b) The names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

If the accused does not intend to call any witnesses, then he need only comply with part (a) of the notice.

The primary purpose of an alibi notice is to alert the prosecution to the fact that an alibi might be relied upon so that they may have the opportunity **before the trial** of making such investigations as they think fit. It may well be that the alibi is in fact true in which event the prosecution will either withdraw the charge or offer no evidence in the case.

The defence of alibi is a legitimate defence and in fact is often the only evidence of an innocent man. The difficulty, it seems to us, is when and how to exclude an alibi defence for non-compliance with s. 402A. First, a distinction should be drawn between a bare denial and an alibi defence. Evidence of bare denial is in any case always admissible. In order to distinguish one from the other, the Court must know the nature of the evidence. As was said in *Ku Lip See v. PP* (*supra*) at p. 196:

> If a trial Court **having considered the evidence** put forward by the defence, holds that such evidence amounts to evidence in support of an alibi for which no notice under s. 402A Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence.
> (Emphasis supplied)

It follows that, initially, the Court cannot prevent an accused person from giving evidence. Having heard the evidence, then the trial Court must decide the nature of the evidence. If it is only evidence of a bare denial, the evidence stays. If it is evidence in support of an alibi and no notice under s. 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.

In the instant case, the trial Magistrate correctly recorded the evidence of the applicant but was wrong to exclude it from the defence evidence because what the applicant said (that he was not involved in the fight and was in bed) is a bare denial of the charge. Had the applicant gone further and proposed to call his wife to corroborate his evidence, then that would be evidence in support of the defence of alibi and the evidence should be excluded. Likewise in the example given, the accused is entitled to say that he was travelling at the material time (which is a bare denial) but if he proceeded to produce his ticket or passport to support his

alibi but not calling any other witness that would be evidence in support of an alibi and unless pre-trial notice has been given, that evidence should be excluded from the Court's consideration.

On the facts of this case, we hold that both the trial Magistrate and the appellate Judge were in error in excluding the applicant's evidence that he was not involved in the fight and that he was in bed at the material time because this was not evidence of an alibi but a mere denial. Be that as it may, we find that there was ample evidence to support the conviction and there are therefore no grounds to make any other order.

For the reasons we have stated, we would answer the question in the Affirmative provided that the evidence is in support of his alibi and not a bare denial.

Also found at [1989] 2 CLJ 402